

ARKANSAS COURT OF APPEALS

DIVISION II

No. CA08-685

PATRICIA WHITE

APPELLANT

V.

RALPH G. KING and KING
CONTRACTORS, INC.

APPELLEES

Opinion Delivered April 8, 2009

APPEAL FROM THE CRITTENDEN
COUNTY CIRCUIT COURT,
[NO. CV 2004-654]

HONORABLE PAMELA
HONEYCUTT, JUDGE

AFFIRMED

LARRY D. VAUGHT, Chief Judge

This appeal involves the revivor of a lawsuit following the death of one of the defendants. The Crittenden County Circuit Court found that appellant Patricia White had not properly revived her lawsuit against appellee Ralph King within twelve months after King's death and granted summary judgment dismissing the lawsuit. In challenging the grant of summary judgment, White argues four points for reversal, including the constitutionality of the revivor statutes. None of the points have merit. Accordingly, we affirm the judgment of the circuit court.

Background

In November 2001, White and King were involved in a traffic accident in Crittenden County. In November 2004, White filed suit against King, alleging that his negligence caused

the accident.¹ King answered, denying the material allegations of the complaint. In addition, he pled the affirmative defenses of the statutes of limitation, waiver, and laches.

On March 11, 2005, in answer to a set of interrogatories propounded by White, it was disclosed that King died on or about January 27, 2005.

On February 8, 2007, King filed a motion for summary judgment, asserting that the case should be dismissed due to White's failure to comply with the requirements of Arkansas Rule of Civil Procedure 25.

After a hearing, the circuit court issued a letter opinion granting the motion for summary judgment on the basis that White had not revived the action within one year of King's death as required by Arkansas Code Annotated sections 16-62-107, 16-62-108, and 16-62-109 (Repl. 2005). The court relied on the supreme court's decision in *Nix v. St. Edward Mercy Medical Center*, 342 Ark. 650, 30 S.W.3d 746 (2000), and found that Rule 25 did not supercede the time limitations in the revivor statutes in which to revive an action. The circuit court specifically denied the motion based on White's failure to comply with Rule 25. After noting that the defendants could have moved for substitution or formally notified White of King's death, but chose not to do so, the court concluded that it would be inequitable "to allow the defendants to in effect, set [sic] on their hands and do nothing, and then when the time has run ask that the claims against them be dismissed."

¹White also sued King's employer, King Contractors, alleging that the employer was liable under theories of agency and negligent entrustment. The circuit court also granted summary judgment to King Contractors and White does not appeal that decision. Therefore, we will refer to the appellees collectively as "King" unless the context requires otherwise.

On August 24, 2007, prior to the court's written order on summary judgment being entered, White filed a motion seeking to have sections 16-62-107 and 16-62-108 declared unconstitutional in that they violated the separation of powers and infringed upon the supreme court's rule-making authority. She also asserted that the statutes infringed upon a fundamental constitutional right by limiting access to the courts. White served a copy of her motion on the attorney general, who declined to intervene.

On January 28, 2008, the court issued a letter opinion denying White's motion to declare sections 16-62-107 and 16-62-108 unconstitutional. The court noted that there is a presumption that statutes are constitutional. The court then relied on *Nix, supra*, and *Deaver v. Faucon Properties*, 367 Ark. 288, 239 S.W.3d 525 (2006), for the proposition that the one-year time limit found in Arkansas Code Annotated sections 16-62-107 and 16-62-108 was not superceded by Ark. R. Civ. P. 25 and found that White had not met her burden of showing a conflict between the statutes and Rule 25.

The court's written orders were entered on February 11, 2008. This appeal followed.

Standard of Review

The parties agree that there are no factual issues to be resolved in this appeal. This case requires a construction of the revivor statutes in conjunction with Rule 25. Therefore, the standard of review is de novo. *Deaver, supra*.

Summary Judgment in favor of King

We need not discuss White's first argument that the circuit court erred in granting summary judgment to King because she failed to comply with Rule 25. The circuit court

specifically denied King's motion based on noncompliance with Rule 25.

For her second argument, White asserts that Rule 25 superceded the revivor statutes so that the one-year periods found in sections 16-62-107 and 16-62-108 do not apply. The supreme court has squarely decided this issue adversely to White in *Nix, supra*, when it held that the time limit in section 16-62-108 was not superceded because it was a substantive requirement. The *Nix* court held that Rule 25 *did* supercede the *procedure* to be used in obtaining an order of revivor.

In the alternative, White argues that, even if the one-year period applies, it should run from the time a suggestion of death is filed in the circuit court. According to White, no proper suggestion of death has been filed so that the time for revivor has not run. Neither Arkansas Rule 25 nor the revivor statutes specify how a party's death is to be suggested on the record so as to trigger the time within which an order of revivor must be obtained. Section 16-62-108 simply provides, in pertinent part, that "an order to so revive the action shall not be made without the consent of the defendant after the expiration of one (1) year from the time when the order might first have been made." The supreme court has construed the time period in section 16-62-108 to run from the first session of court where an order of revivor could be made. *Woolfolk v. Davis*, 225 Ark. 722, 285 S.W.2d 321 (1955); *Heilig v. Haskins*, 192 Ark. 311, 90 S.W.2d 986 (1936). We cannot say that the circuit court erred in applying the one-year periods found in sections 16-62-107 and 16-62-108.

White's next argument is that King failed to secure an order of substitution and that failure resulted in a waiver of King's affirmative defense of the statute of limitations. The

circuit court did not rule on this matter, so we decline to address it. *IGF Ins. Co. v. Hat Creek P'ship*, 349 Ark. 133, 76 S.W.3d 859 (2002).

Finally, White's last argument for reversal of the summary judgment is that the circuit court abused its discretion in dismissing her complaint. Rule 25 does give the circuit court some discretion as to whether the case should be dismissed. However, Arkansas Code Annotated section 16-62-109 makes dismissal mandatory if an order of revivor is not entered within one year of the death of the party. *Dupree v. Smith*, 150 Ark. 80, 233 S.W. 812 (1921). Therefore, the circuit court did not abuse its discretion in dismissing White's action.

Constitutionality of Sections 16-62-107 and 16-62-108

White also appeals from the circuit court's order finding that Ark. Code Ann. §§ 16-62-107 and 16-62-108 are not unconstitutional. White contends that, because Amendment 80 mandates that the supreme court prescribe the rules of procedure for all Arkansas courts, the legislature may not enact any law that would infringe upon those powers conferred upon the judiciary to promulgate rules of procedure. Thus, according to White, the enactment of such a law would violate the separation-of-powers doctrine as reflected in the Arkansas Constitution.

At common law, tort actions abated upon the death of either party. *See generally Miller v. Nuckolls*, 76 Ark. 485, 89 S.W. 88 (1905). A personal representative does not automatically succeed to the decedent's rights and status as a litigant. He is not a party to the suit, but is permitted by the statutes to raise it from limbo and become a party to it. Sections 16-62-107 and 16-62-108 are not laws relating to pleading, practice, and procedure within the meaning

of Amendment 80; they are statutes of limitations, *Deaver, supra*. The time limits found in sections 16-62-107 and 16-62-108 do not infringe upon a party's right to access the courts because, by definition, the revivor statutes only apply in cases where a party dies *after* a lawsuit is commenced. If the party dies before the action is commenced, then the personal representative is the proper party to bring or defend the suit. Therefore, we cannot say that sections 16-62-107 and 16-62-108 are unconstitutional.

Affirmed.

HART and BROWN, JJ., agree.